No. 3855

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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MILLIE L. EVANS, now MILLIE L. JONES,
Plaintiff in Error,

vs.

J. B. DANIEL,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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Statement of Case.

This case comes up on writ of error to the District Court of the United States for the District of Nevada where judgment was rendered in favor of the plaintiff there who is the defendant in error here.

The action was for damages for injuries sustained by the defendant in error who was struck by a Ford automobile operated by one Fred Davis, in Lovelock, Nevada, while crossing the street on foot.

The original complaint alleges that Davis was at the time of the accident a servant of the plaintiff in error and was in possession of, and operating the

automobile as a servant of plaintiff in error in the course of his employment as such.

This was admitted by the original answer of the plaintiff in error. Thereafter an amended complaint was filed substantially repeating the averments above referred to with some elaboration. To this amended complaint, plaintiff in error interposed an answer in which among other things, she specifically denied said averments.

The only question here involved is whether or not Davis was in fact the employee of the plaintiff in error.

To prove the employment the plaintiff below offered in evidence the answer to his original complaint. This, and nothing more. The answer was admitted in evidence over the objection of the attorneys for the plaintiff in error. Hence there is presented but one question for determination here, and that is whether the admission in evidence of the answer to the original complaint was error. If it was, the judgment must be reversed.

To the ruling of the learned District Judge in admitting this answer an exception was duly taken (Trans. 142).

Specification of Error.

"XVI."

"The Court erred in overruling defendant's objection to the introduction in evidence of the

original complaint and the original answer, to which ruling defendant duly excepted. Transcript pp. 132, 133."

Argument.

This is an action of damages in which it is charged that the defendant in error was injured by a certain Ford automobile.

The third paragraph of the original complaint was as follows:

> "That the defendant was then and there the owner of a certain Ford automobile which was then and there being driven along said street by one Fred Davis, said Fred Davis being then and there a servant in the employ of defendant, and in possession of said automobile as the servant of defendant and driving and operating the same under defendant's direction and control and in the course of his employment."

The answer to this allegation is in the following words:

> "Defendant admits the matters and things in the third paragraph of plaintiff's complaint contained."

Thereafter an amended complaint was filed in which it was among other things alleged:

> "SECOND.
>
> That at the times hereinafter mentioned one Fred Davis was then and there a servant in the employ of the said defendant and whose duty embraced the business of conveying employees and workmen to and from the ranches

of the defendant to the city of Lovelock and conveying supplies and messages between the said city of Lovelock and said defendant's ranches. That in the course of his employment the said Fred Davis used and was in possession of an automobile furnished to him by defendant and the property of the defendant, and which automobile he was, at the time hereinafter mentioned, operating in the regular course of his employment and under the direction and control of the said defendant through her duly authorized superintendent and ranch manager, W. R. McCulloch.

THIRD.

That on the 28th day of July, 1919, plaintiff was lawfully walking upon and across a public street and thoroughfare in the City of Lovelock, County of Pershing, State of Nevada, then named and known as Fourth Street, but since named Main Street. That the defendant's said servant, Fred Davis, was at the same time and date and in the (20) course of his employment, on the said street and driving an automobile owned by the defendant as aforesaid."

To this amended complaint plaintiff in error answered in due course. The first and second paragraphs of her answer are as follows:

"I.

For answer to paragraph numbered "Second" of the complaint, defendant denies that at the times mentioned in the complaint, or at any other time, or at all, one Fred Davis was a servant in the employ of defendant; denies that in the course of his employment said Fred Davis used and was in the possession of, or used or was in the possession of, an automobile furnished to him by the defendant and the property of the defendant, or of an automobile

furnished to him by the defendant, or which he was operating in the regular course of his employment and under the direction and control of defendant through her ranch superintendent and ranch manager, W. R. McCulloch, or which he was operating in any other manner under the direction or control of defendant.

II.

Answering paragraph numbered "Third" of plaintiff's complaint, defendant denies all the allegations in said paragraph contained save and except that at the time alleged in said paragraph Fred Davis was on the street therein named driving an automobile owned by defendant, and in this behalf defendant is informed and believes and therefore, on such information and belief, alleges the fact to be that plaintiff was then and there walking upon and across said street in an unlawful, careless, negligent and indifferent manner."

At the trial defendant in error offered in evidence the answer to the original complaint for the purpose of showing the admissions of plaintiff in error, and particularly the admission of the third paragraph of the original complaint (Trans. 141).

Plaintiff in error objected and the objection was overruled and an exception duly taken (Trans. 142). Specification of Error No. XVI, Trans. 240.

The admission contained in the original answer constituted the only evidence offered to prove the ownership of the automobile by the plaintiff in error and the employment by her of the driver. Hence the question of the admissibility of the defunct pleading is vital.

There is a decided conflict in the authorities upon the question and no decision upon the point has been discovered by the writer in the Nevada courts, but, as is well known, the courts of Nevada in actual practice ordinarily follow the decisions of the California Supreme Court.

Practically this may be attributed to the propinquity of the two states whose intimacy is historical. Legally a basis may well be found in the fact that the State of Nevada acquired a large part, if not all, of its territory from California, (See organic law of Nevada, Act of March 2, 1861) and from the further point that the procedural laws and practically the entire body of all its laws were adopted from the State of California.

The rule as to the adoption of the judicial construction of laws imported from another state, given to them by the courts of the state from which they were taken, is of course, well established.

Williams v. Glasgow 1 Nev. 533.

In adopting the Practice Act of California, it must be presumed to have been adopted as interpreted by the highest court of judicature of that State.

In *Whitmore v. Shiverick,* 3 Nev. 289, it was contended by appellant that the statute does not require a statement on appeal to be served on the opposite side. But the court speaking through Beatty, C. J. held the contrary.

> "Our practice act was copied almost *verbatim* from the California practice act as it stood at the time ours was enacted. Under the California Code of practice, the Supreme Court of that State had almost uniformly refused to review the facts of a case unless there had been a regular statement and motion for a new trial." (Citing Cal. cases.) p. 303.
>
> *Weil v. Howard,* 4 Nev. 393;
>
> *McLane v. Abrams,* 2 Nev. 206;
>
> *State v. Parkinson,* 5 Nev. 24;
>
> *Hess v. Pegg,* 7 Nev. 27;
>
> *State v. Rokey,* 8 Nev. 320;
>
> *Robinson v. Belt,* 187 U. S. 48;
>
> *Gossage v. Crown Point,* 14 Nev. 157.

In this case the Supreme Court of Nevada in construing a Nevada statute which was identical with a statute of California and also of Michigan, shows a strong leaning towards the decisions of the California courts.

The Michigan Supreme Court had construed the statute prior to its adoption by Nevada, and the California Supreme Court afterwards, (p. 156), and the decisions were in conflict. Nevertheless the Supreme Court of Nevada says:

> "But in deciding the question involved in this case, we propose to give to the decisions of California equal weight and equal consideration, and determine for ourselves which view of the case is best sustained upon reason or sanctioned by the authority of analogous cases" (p. 158).

From this it is obvious that subsequent decisions of the highest court in California are deemed by the courts of Nevada as at least strongly persuasive of the construction to be given a law adopted from that state, and of the general tendency of the Nevada courts, when without precedents of their own, to look to the guidance of California authorities.

And the rules of evidence prescribed by the laws of a State are rules of decision for the United States courts while sitting within the limits of such state.

Ryan v. Bindley, 1 Wall. 66.

DEFUNCT PLEADINGS FOR WHICH OTHER AND AMENDED PLEADINGS HAVE BEEN SUBSTITUTED ARE NOT ADMISSIBLE TO PROVE ADMISSIONS.

This rule has been so thoroughly established in California as to admit of no controversy.

Mecham v. McKay, 37 Cal. 154-165 (decided in 1869).

> "But we think the Court erred in admitting in evidence, against the objections of the defendants, the original answers filed by them in this action, and which had been superseded by the amended answers. The original answers were offered in evidence by the plaintiff as an admission by the defendants of their possession and occupation of the room in contest. Whilst it is true that pleadings in a cause containing admissions of facts dispense with the necessity of proving the facts admitted, the rule applies only to the subsisting pleadings on which the cause is tried, and not to defunct pleadings, for which other and amended plead-

ings have been substituted. It has doubtless often happened that a pleading contains admissions made under a misapprehension of the facts. In such cases, if the party amends his pleading, stating the facts differently, he would reap no benefit from his amendment, if the adverse party were at liberty to use the first pleading as an admission to overthrow the amended pleading. It cannot be a sound rule of evidence which works such results and practically puts it out of the power of a party to avoid the effect of a mistake in the original pleading.

The pleading on which a party goes to trial is the one on which he places his defense or cause of action, and he is bound by its admissions. But in many cases it would operate as a gross injustice to hold him to be bound by the admissions of a former pleading, made, perhaps, under a mistake of the facts, and which has become *functus officio* by the substitution of an amended pleading.

We are aware that the reverse of this proposition was announced by this Court in *Carpentier v. Small,* decided at the October Term, 1866; but a rehearing was granted in that cause, and the point was not discussed in the last opinion (35 Cal. 346)."

Ponce v. McElvy, 51 Cal. 222.

Reversed because of admission of original complaint as evidence, on authority of *Mecham v. McKay, supra.*

Osment v. McElrath, 68 Cal. 466;

Wheeler v. West, 71 Cal. 126.

Reversed on authority of *Mecham v. McKay* and *Ponce v. McElvy,* supra.

Stern v. Lowenthal, 77 Cal 340;

Miles v. Woodward, 115 Cal. 308-316.

Reversed following *Mecham v. McKay,* supra, and *Ralphs v. Hensler,* 114 Cal. 196.

Ralphs v. Hensler, 114 Cal. 196.

"The principal contention upon this appeal is, that at the time when the judgment was rendered there was no evidence before the court of a ratification; that the pleading in which acts constituting a ratification had been set up by defendant, and which pleading amounted to a binding admission against her, was no longer subsisting and operative; that it had been superseded for all purposes by the amended answer which was before the court when the cause was determined; that the record discloses that the pleading containing the admissions was never introduced in evidence; that it was merely exhibited to the court, and that, if introduced in evidence, when the pleadings were changed and the admission withdrawn, it ceased to be evidence in the case, and could not, therefore, have been properly considered by the judge.

This contention of appellant must be sustained. It was early held in the case of *Mecham v. McKay,* 37 Cal. 154, that an original pleading containing an admission against interest, which original pleading had been superseded by an amended pleading, could not be admitted in evidence against the pleader, and it was said: 'If the party amends his pleading stating the facts differently he would reap no benefit from his amendment, if the adverse party were at liberty to use the first pleading as an admission to overthrow the amended pleading.' This case has frequently been followed. (Ponce v. McElvy, 51 Cal. 22; Pfister v. Wade, 69 Cal. 133; Wheeler v. West, 71 Cal. 126.) Under the rule as thus laid down defendants' answer containing the admissions amounting to a ratification

was superseded and ceased to be a subsisting pleading. Its declarations could not have been received or considered by the court. But in the absence of those declarations there is not other evidence in the case tending to show ratification, nor is it even contended by respondent's attorney that the power of attorney executed by Mrs. Hensler to McCarthy contains sufficient authority for the execution in Mrs. Hensler's name of the note and mortgage in suit.

It follows that the judgment and order must be reversed and the cause remanded, and it is ordered accordingly."

These cases are not to be confused with those which hold that a pleading filed by one of the parties in another action may be used in evidence to show material admissions.

Such cases are

Duff v. Duff, 71 Cal. 531, 521;
Kamm v. Bank of California, 74 Cal. 191;
Coward v. Clanton, 79 Cal. 23.

They are also clearly distinguishable from those cases which hold that superseded pleadings may be used on cross-examination to impeach a witness under C. C. P. Sec. 2052.

Johnson v. Powers, 65 Cal. 179;
In re O'Connor, 118 Cal. 69.

We find one California case which holds such a pleading admissible to prove independent facts such

as the date of the pleading, the contents of a lost document of which it contained a copy, or an offer to pay money into court. This case, however, expressly affirms the rule for which we contend.

> "Plaintiffs in their second amended complaint averred that they were and always had been ready and willing to pay over to the parties entitled thereto the amount due upon the wheat, and offered to pay the money into court.
>
> At the trial, plaintiffs, for the purpose of showing their offer to fulfill the contract, by paying the money into court, offered in evidence the original complaint, filed January 25, 1878, which contained such offer, and which for that purpose was admitted.
>
> There can be no question but that an amended complaint takes the place of the original, and then when filed the original ceases to perform any further functions as a pleading. (Barber v. Reynolds, 33 Cal. 497; Kelly v. McKibben, 54 Cal. 192.)
>
> And although a party is bound by the admissions in his pleadings, yet it is only by the admissions in the pleadings upon which he goes to trial, and not by those in pleadings which have been superseded, that he is bound. (Mecham v. McKay, 37 Cal. 154; Ponce v. McElvy, 51 Cal. 222; Kentfield v. Hayes, 57 Cal. 409.)
>
> It would work rank injustice to hold a party bound by statements or admissions in a pleading, which had been amended, for the very reason that they were inserted by inadvertence or mistake, and yet the rule which would admit it in evidence would have just this effect.
>
> To permit it to be introduced generally as evidence in favor of the party by whom it was

filed, would be to permit a party to manufacture testimony in his own behalf.

While the general rule excludes all pleadings which have been superseded by others, it does not follow that an original pleading thus superseded may not be admissible in evidence in support of some independent fact connected with the case.

Whenever the date at which a pleading was filed becomes important, it may be introduced as evidence of that fact, although a later pleading has taken its place.

So, too, if a pleading contains a copy of an instrument, the original of which is afterward lost, the fact that it is embodied in a pleading, and the further fact that such pleading has been superseded by another, does not prevent the copy from being introduced in evidence upon proof of its authenticity, just as though it was a separate instrument.

In other words, it is in a proper case admissible in evidence, not because it is found in the pleading, but as a fact proper to be admitted.

In the present case, had the plaintiff served a written notice of their offer to pay the money into court, upon defendant Bliss, the notice would have been proper evidence, and the circumstance of the offer having been contained in a pleading did not alter its admissibility.

This was followed by proof that the money was actually paid into court, and that it still remains there, subject to the final disposition of the case. Under the pleading we are of opinion all this evidence was proper."

Pfister v. Wade, 69 Cal. 138, 139.

DISTINCTION BETWEEN SWORN STATEMENTS OF AN AFFIRMATIVE CHARACTER AND MERE ADMISSIONS IN VERIFIED PLEADINGS.

Some of the cases make a distinction between unverified pleadings or pleadings verified by an attorney and pleadings verified by the party himself. In other words the admissibility of the defunct pleading is based upon the fact that it is sworn to by the party himself.

In *Smith v. Davidson,* 41 Fed. 172 the Circuit Court reversed the trial court because the original answer verified by one of the attorneys for the defendant was admitted in evidence as an admission by the defendant of the facts therein stated.

See note to *Arkansas City v. Payne,* 18 Ann. Cas. 83; *Barrett v. Featherstone,* 89 Tex. 567, 35 S. W. 11, 36 S. W. 245.

In the case now before the court there was, it is true, in the answer to the original complaint an express admission of the matters and things in the third paragraph of plaintiff's complaint contained.

But there was no allegation that those matters and things or any of them were true—in other words plaintiff in error never stated under oath or otherwise that they or any of them were true.

A mere admission in an answer is obviously not an averment or a statement of fact, and it does not seem clear how any greater or other effect can be given to it than to the admission which the law implies from a failure to answer an allegation. But

it will scarcely be contended that had the third paragraph of the complaint gone unanswered, the pleading of the plaintiff in error could have been introduced to prove the facts which she failed to deny.

Pleadings have been defined to be

> " 'The statement, of the parties, in legal and proper manner, of the causes of action and grounds of defense * * * They were formerly made by the parties or their counsel, orally, in open Court, under the control of the Court.' In other words, pleadings are but the statements of the issues to be tried."
>
> *Bowman v. McLaughlin,* 45 Miss. 461, 489.
>
> (Quoting Bouvier Law Dictionary.)
>
> 31 Cyc. 43.

The function of pleadings is of course merely to make up and present to the court the formal issues upon which the parties to the litigation elect to stand at the trial of the case.

It may very well be that the attorneys for the plaintiff in error in this case considered that their defense to the original complaint was so strong in other respects as not to necessitate putting in issue the question of the ownership of the automobile or of the employment of its driver, and that such was the case, in the view of defendant in error at least, is evident from the fact that he did in fact amend his complaint. Then for the first time plaintiff in error, or her attorneys, found it necessary to put these matters in issue.

It would be quite as unjust to hold the plaintiff in error to the admissions, wholly judicial in character be it said, made upon the answer to the original complaint as it would to hold a party to the admissions or averments made in one of two inconsistent pleas upon the trial of the other. That the latter cannot be done is well settled.

Glenn v. Summer, 132 U. S. 157, 33 L. Ed. 301.

THE RULE IN OTHER JURISDICTIONS PERMITTING THE ADMISSION OF A DEFUNCT PLEADING APPLIES ONLY TO PLEADINGS WHICH ARE VOLUNTARILY ABANDONED.

This principle is illustrated by the instance where a party is required to elect between two pleadings or defenses or where a pleading is stricken out by order of court. In such cases the statements contained therein cannot be used in evidence as admissions.

Lane v. Bryant, 100 Ky. 138, 36 L. R. A. 709;
Dunson v. Nacodoches County, 15 Tex. Cir. App. 9.
16 *Cyc.* 972 and cases there cited.

The present case, it will be noted, is not a case in which the plaintiff in error voluntarily amended her own answer. Her answer was rendered nugatory by the act of the defendant in error in amending his complaint. Hence we submit that the original answer was improperly admitted, even under the rule which obtains in other jurisdictions.

CASES CITED BY TRIAL JUDGE IN SUPPORT OF ADMISSIBILITY OF DEFUNCT PLEADING.

The learned trial judge in the opinion handed down by him on motion for new trial cites eight cases in support of his ruling (Trans. 304). We shall briefly refer to them.

One of these cases, *In re O'Connor's Estate,* 118 Cal. 69, has already been discussed by the writer. It does not bear upon the point to which it is cited. It holds, merely,

> "that the fact of the pleading being superseded by another furnished no valid ground for rejecting the admissions therein contained *when offered for impeachment purposes*" (71).

Of the remaining cases four have reference to the admissibility of original *petitions,* which of course, set up in the form of affirmative statements the facts for the proof of which they were offered in evidence.

These cases are:—

Arnd v. Aylesworth, supra;
Watt v. Missouri, K. & T. Ry. Co., supra;
Reemsnyder v. Reemsnyder, supra;
Meek v. Deal, supra.

But, as we have already attempted to show, a sworn statement of an affirmative character is quite a different thing from an admission of certain allegations contained in a pleading.

This leaves but three of the cases cited by the learned District Judge.

Kilpatrick-Koch Dry Goods Co. v. Box, 45 Pac. 629.

This is a Utah case, decided in 1896, upon the authority of a former Utah case without any general consideration of the authorities, and, moreover, falls within one of the exceptions to the rule above discussed, said to obtain in certain other jurisdictions, in that the amendment was voluntary upon the part of the defendant and not forced upon him by the plaintiff through an amended complaint.

Johnson v. Sheridan Lumber Co., 93 Pac. 470 is an Oregon case, decided in 1908, and the original answer, which was verified, by the secretary of the defendant corporation, not only appears to have been superseded by a voluntary amended answer, but it directly denied certain allegations of the complaint and made other affirmative allegations of fact which bring it within the same class of cases as Arnd v. Aylesworth and the companion cases above cited in which original petitions were admitted after amendment.

Scoville v. Brock, 118 Am. St. Rep. 975, the only remaining case cited by the learned District Judge was a Vermont case, decided in 1907. In that case the plaintiff filed a bill which was held insufficient on demurrer, and two several amendments thereto were afterwards filed. The defendant then answered the bill and the amendments, "waiving the answer to the original bill."

The court's discussion seems to turn upon the question whether a bill to which a demurrer has been sustained is out of court to such an extent that it cannot be reinstated by an amendment and it is not clear that there were any admissions in the answer which were admitted or, if so, what was the form of the admissions. The remarks of the court as to the admissibility in evidence of an original answer may fairly be regarded as *dicta*.

It is submitted that the learned trial judge erred in admitting the original answer and that the judgment should be reversed.

Dated, San Francisco,
September 25, 1922.

Respectfully submitted,
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